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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 559

ROBERT MILLS, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Government, in its brief in opposition, recognizes the unusual severity of the sentence imposed in this case and indicates its willingness to support a "very substantial modification of . . . [petitioner's] sentence" should the petition for certiorari be denied (Opp. 13). Petitioner appreciates this offer and acquiesces in the Government's desire to see the substantial wrong done this petitioner rectified.

However, the form of the Government's proposal obscures more fundamental inquiries which necessarily must precede any consideration of a reduction in sentence, *i.e.*, did this petitioner receive a fair trial, or was he denied due process and, even more fundamentally, should this petitioner have been so much as exposed to being sentenced at all? The questions raised in this petition for certiorari touch not only the interests of this petitioner—they relate also to im-

portant questions of substance and procedure which could affect our whole judicial system. What is equally important, they are presented in this case in a posture which makes them ripe for determination. This Court should cause the writ to issue so that these important questions might be settled.

Although acquiescing in the Government's proposal for a reduction in sentence, petitioner specifically takes issue with the following points raised in the brief in opposition.

1. The Government has chosen to relegate to the end of its brief (Opp. 11) consideration of the question of the serious illness of the juror and the failure of the trial court to take remedial action. However, in reply, petitioner will treat this question first, as was done in the petition (Pet. 6), since petitioner considers it to be of prime importance and worthy of the closest scrutiny by this Court.

The brief in opposition ignores the specific issue raised by petitioner regarding the jury question. Simply stated, the question presented is this: what duty, consistent with the demands of due process, devolves upon a federal trial court judge in the circumstances present in this case? The correlative inquiry is, manifestly, did the court meet and discharge this duty; but the key question, and the one which demands authoritative interpretation by this Court, is the plain and forthright standard-of-duty question.

As petitioner argued in the petition for certiorari (Pet. 6-9), there is no precedent on this precise question in federal law; in closely analogous situations, federal courts have recognized a duty in the trial court to conduct such a hearing (Pet. 8-9). It appears further that state courts would require affirmative action

on the part of the trial court judge under closely allied circumstances.[1] Certainly, no less requirement should be demanded of the federal courts. Finally, plain common sense and the dictates of fair play would require *at least* the holding of a hearing by the trial court when a question of the serious illness of a juror during the jury deliberations is raised, no matter when the fact comes to light.

In addition to misconstruing the thrust of petitioner's argument,[2] the brief in opposition faults peti-

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[1] See, e.g., *People* v. *Von Badenthal*, 8 Cal. App. 2d 404, 48 P.2d 82 (1935) where, in a factual setting closely analogous to ours, a woman juror became ill at the dinner table, fainted, and was found by a physician to have suffered a heart attack induced by acute indigestion. The trial court held a hearing after discovering the illness, causing the jury to be brought back into the courtroom along with the defendant, counsel, and the attending physician. The trial court dismissed the juror on the basis of the evidence adduced at the hearing, including testimony of the physician that the woman was highly nervous and hysterical and that she could not perform the duties of a juror. See generally, Annot., 84 A.L.R.2d 1288, 1304, 1309-11 (1962), for discussion of state statutes designed to obviate the problems arising upon the serious illness of a juror, providing for a hearing by the trial judge and substitution of an alternate juror.

[2] The Government attempts to distinguish cases cited by petitioner as authority for the proposition that the trial court has a duty to hold a hearing, by arguing that "Unlike the instant case, they [petitioner's authorities] involved direct and flagrant interference by bailiffs with a deliberating jury" (Opp. 12, n. 8). Petitioner grants that the factual stimuli prompting the hearing by the court differs in the cases cited—the point which remains unrefuted, and the purpose for which petitioner cited such authorities, is that the courts in these other closely analogous situations *caused a hearing to be held*. Further, the dereliction of duty by the marshal and bailiff here is just as flagrant an interference with the jury deliberations as that of the court officers in the cases cited.

tioner for not taking certain procedural steps at the time of the disclosure of the illness (Opp. 11-12). Petitioner's counsel did not learn of the illness until he was on the way into the courtroom for the sentencing proceedings (R. 113); he immediately informed the judge of all that he knew concerning the matter. While it is easy for the Government to second-guess the tactics of defense counsel from this vantage point, it must be perfectly plain on the record, without resort to such conjecture why petitioner's counsel did not adamantly press the court for action at that time. Debate with the trial judge over his handling of a question of this sort immediately prior to the sentencing of petitioner would not appear the better part of prudence, especially in view of the trial court's handling of previous requests by petitioner's counsel during the trial.[3]

This factor only points up more dramatically the necessity for an authoritative explication of the trial court's duty when such facts become known at the sentencing proceedings. If the trial court is left free to dismiss the whole thing cavalierly, and counsel is hesitant to press his demand for fear of a possible increase in sentence by an antagonized judge, what happens to the interests of the defendant? There is no need to put defense counsel and the interests of the defendant to such a choice. This Court, on the basis of its supervisory power over the federal court system, should authoritatively explicate what the duty of the trial judge is under circumstances such as are present here, thereby answering this question once and for all. Peti-

[3] One of the points relied upon for reversal in the Court of Appeals was that the prejudice of the trial judge, manifested by certain rulings made by him, prevented petitioner from having a fair and impartial trial.

tioner respectfully submits that this duty and the demands of due process can be satisfied only by a requirement that the trial court conduct a full reported hearing, under oath and with both counsel present and allowed to examine all participants. See *United States* v. *Flynn,* 216 F.2d 354, 368 (2d Cir. 1954) (Pet. 8), wherein the duty to hold such a hearing was recognized under circumstances closely akin to those present here. In *Flynn* the question went to the impartiality of a juror. In this case the juror was in fear for his life, a condition which certainly raises a question as to his then impartiality, or ability to make a free choice.

The Government also avers to the fact, as did the Court of Appeals, that the juror who suffered the heart attack had "never sought to communicate with the court about his alleged illness, and had not raised any question at the time the verdict was entered in open court . . ." (Opp. 12; Pet. 9a). As to the first point, the juror *did* communicate with the court; the bailiff and marshal, *officers of the court,* were both fully advised of his condition; this would have been of more than passing significance had they fulfilled their duty and communicated this fact to the court, or had the trial judge bothered to make inquiry at the time it was brought to his attention.

As to the second point, petitioner finds it difficult to comprehend that the Government here, or the Court of Appeals below could seriously argue that the juror should not have been allowed to "impeach" his verdict after the trial, since he did not object to the verdict in court and communicate the fact of his illness at that time. It would be most difficult, as well as improbable for a man who had just suffered a heart seizure to have to stand up in court and deny that the ver-

dict was his; his natural inclination would be to *avoid* controversy, (which would certainly have followed upon such a communication) and passively to acquiesce, in order to escape quickly from the pressures of the courtroom.

2. The Government argues that petitioner's counsel's "rhetorical inquiry to the witness" did not constitute sufficient demand for the Jencks Act report at issue in this case (Opp. 10). While it may be that the question was *directed to* the witness, counsel was, in effect, seeking a ruling from the trial court by his question, even though he did not specifically articulate a *motion* to the court for production of the report. The question for determination here, then, taking into consideration the purposes underlying the Jencks Act and the problems already facing defense counsel in invoking its protection, is whether this is enough to constitute a "demand."

In considering this question, the Government's brief obscures two important points made by petitioner. First: the manifest confusion in the courtroom over the question of whether the document was producible. Counsel for petitioner was obviously misled by the Government attorney's adamant assertion that the report was *not* producible under the act; further, the court made no ruling even when the Government attorney objected to defense counsel's demand. The fact that the Government attorney objected to petitioner's tacit demand, and the manner of the objection indicates that *he* at least thought the request directed to the court.

Second: the Government completely ignores the fact of the trial court's awareness of petitioner's previously communicated desire to see this report (Pet. 12-13). This awareness, coupled with defense counsel's

manifested desire to see the report, plus the objection by the Government attorney, demonstrates the ineffectiveness of the court's administration of the statute in this case.

The Government, once again in emulation of the Court of Appeals, finally dismisses the Jencks Act question with a gratuitous imputation of "trial tactics" to defense counsel, *i.e.*, that he did not press the point because he was content with whatever psychological advantage he could gain because of the attitude of the Government's witness, or because he feared that if the document were actually produced, this might have undermined petitioner's own denial that he made the statements (Opp. 10; Pet. 7a).

This Court has admonished against courts substituting their judgment as to trial strategy for that of defense counsel, *e.g.*, in considering the question of whether a defense counsel could have effectively used a Jencks Act statement which was denied to him at the trial. *Rosenberg* v. *United States*, 360 U.S. 367, 376 (dissenting opinion). The admonition in that case would seem equally apropos here. For the Government or the Court of Appeals to attempt to impute to defense counsel the motives implicit in the "trial tactics" argument is to pretend to knowledge they cannot possibly have—and conjecture is not enough.

A more reasonable explanation for defense counsel's failure to press the demand is that suggested by a fair reading of the colloquy, considered in the context of the trial court setting. Such a reading reflects that counsel was not schooled in the subtleties of what is or is not a Jencks Act statement, that the Government attorney adamantly asserted that he had no right to it and thereby misled defense counsel, and finally, the

court's silence gave the Government attorney's assertion at least tacit approbation thus creating the impression in the mind of defense counsel that he had no right to the statement. Petitioner reasserts its argument made in the petition—this tacit demand was enough to satisfy the requirements of the statute and should be given effect as such. It does not serve the administration of justice generally, nor the interest of this petitioner particularly, to apply this act in such an illiberal manner. A mere failure of defense counsel to word his request in technical language in making a demand for a statement under the Jencks Act, amounting to no more than an exercise in semantics, should not prejudice the substantial rights of this petitioner.

It should be noted also that the Government argues (Opp. 10, n. 7) that the question, "May I see it?" made by defense counsel in *Howard* v. *United States*, 278 F.2d 872 (D.C. Cir. 1960), upon which petitioner relies, was addressed to the court and not the witness, thereby attempting to distinguish it from our case. Petitioner respectfully submits that this assertion is *nowhere* substantiated in the reported opinion, that the opinion and the colloquy reflect that it was addressed *to the witness* (Pet. 11), and that any knowledge the Government purports to possess on this point outside of what is reported is hearsay in the classic sense and should be ignored as such. The conflict between *Howard* and this case does in fact exist, as a simple juxtaposition of the language from the two cases demonstrates. (Compare Pet. 10 with Pet. 11.)

Further, the Government's reliance on *Harrison* v. *United States*, 318 F.2d 220 (D.C. Cir. 1963), cert. denied, 377 U.S. 911 (Opp. 10, n. 7) is misplaced, since the defense counsel there specifically *declined* any in-

terest in seeing the notes in question. *Harrison*, in fact, is authority for petitioner's argument that the Court has an affirmative duty to take action under these circumstances, since the court there *directed a specific inquiry to the defense counsel*, asking him if he wanted to see the notes.[4]

3. The Government relies on *United States* v. *Healy*, 376 U.S. 75, as authority for the proposition that private aircraft were intended by Congress to come within the proscription of 49 U.S.C. 1472(j), since this Court in *Healy*, construing the companion hijacking section, found that Congress intended private aircraft to fall within the ambit of that section. The only authority that the Government alludes to in support of its contention is the statement that "There is no reason to believe that Congress meant Section 1472(j), which was part of the same body of legislation as Section 1472(i), to have any narrower compass" (Opp. 5).

Petitioner submits that, on the basis of a full reading of the legislative history, there is *every* reason to believe that Congress did not so intend. (See Pet. 19-22.) Nowhere in the hearing or debates does Congress once consider the question of "assaults, intimidates or threatens" in anything but a hijacking context. Petitioner's argument is not with the application of Section 1472(j) to hijacking situations; it is, rather, that when applied *outside* a hijacking context, *e.g.*, in a situation such as we have present here, that it is applied in a manner *not intended* by Congress.

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[4] The Court: I do not want to examine them. Do you want to examine them Mr. Garbis?

Mr. Garbis [appellant's counsel]: No. Mr. Murphy's word is good enough for me, Your Honor.

The Court: All right. Id. at 221.

The Government further argues that the statute is not unconstitutionally vague or indefinite, because the conduct involved in this particular case is "definitely understood to be unlawful" (Opp. 7). But, is it? Considering for a moment the first alleged act of interference with the performance of the pilot's duties by the petitioner: This was not a hijacking situation. Petitioner chartered this plane and hired this pilot to fly him to a destination chosen by petitioner. He was an experienced pilot—he had flown with this same pilot previously, and testified that the pilot had let him handle the controls. The taking over of the controls (which virtually rested in his lap) to change the compass heading, in a plane whose destination he controlled, is at best an ambiguous act legally. However, under a literal application of the language of this act, such conduct could be held unlawful, since in some degree petitioner had interfered with the ability of his hired pilot to perform his duties. Conceivably, this could be construed as a form of intimidation of the pilot, and the Government, on the complaint of the pilot, could prosecute under this section of the act. It is not enough to say that the provisions of the act will be wisely administered in order to preclude any such interpretation—petitioner's present plight stands in mute refutation of such an argument.

It is because of this possible breadth of application, unfettered or illumed by standards, that this section is unconstitutionally vague. Granted that the "safety of the airlanes requires that pilots of all crafts, commercial or private, be free from harassment or intimidation during the flight" (Opp. 6). It is equally important that the pilot and his passengers be on

notice as to what conduct occurring in these airlanes is or is not unlawful. This statute applied in this type situation does *not* provide that notice and is therefore unconstitutionally vague.

This Court should grant this petition and resolve the manifest confusion surrounding the meaning and application of this section of the act, in order to guide not only the public in their aviation conduct, but also the Government and the courts in the prosecution and interpretation of the act.

CONCLUSION

For all of the reasons developed herein and in the petition for certiorari, petitioner respectfully prays that this Court cause the writ to issue. Upon full consideration by this Court, petitioner further prays that the case either be dismissed because of the unconstitutionality of Section 1472(j), or because private aircraft were not intended by Congress to be covered by such section. If the Court should not so find, petitioner prays alternatively that the decision instead be reversed because of the substantive and procedural errors committed by the trial court, and sent back for a new trial.

Respectfuly submitted,

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